(2)

No. 86-2048

In the Supreme Court of the United States

OCTOBER TERM, 1987

HORACE GREELY THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

13pp

QUESTION PRESENTED

Whether petitioner's claim—that his prior (and now vacated) plea of guilty to a one-count information charging conspiracy to commit mail fraud raised a bar under the Double Jeopardy Clause to a subsequent indictment for substantive mail fraud and conspiracy to defraud the United States—was sufficiently colorable to permit an interlocutory appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-2048

HORACE GREELY THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 814 F.2d 1472. The memorandum opinion and order of the district court (Pet. App. B2-B5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1987. A petition for rehearing and suggestion for rehearing en banc was denied on April 20, 1987. The petition for a writ of certiorari was filed on June 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 9, 1983, petitioner entered into a plea agreement under which, in return for his truthful testimony, the government would charge him by information with, and he would plead guilty to, one count of conspiring to commit mail fraud, in violation of 18 U.S.C. 371 and 1341. On July 3, 1985, petitioner pleaded guilty in the United States District Court for the Western District of Oklahoma to that one-count information.

Petitioner's plea agreement required that he fully disclose all facts within his knowledge relevant to the government's investigation and testify truthfully at all grand jury proceedings. In addition, the plea agreement stated that if petitioner did not testify truthfully the agreement was void. On August 30, 1985, before petitioner's sentencing on his July 3 guilty plea, the government moved to set aside petitioner's guilty plea on the ground that he had breached the agreement by changing his testimony concerning a target of the investigation (see Pet. App. B3-B4). Though petitioner contended that he had complied with the plea agreement, the district judge found otherwise and granted the government's motion (see *id.* at B3). Petitioner appealed from the order dismissing the information and setting aside the guilty plea.

On September 16, 1985, a grand jury in the Western District of Oklahoma indicted petitioner on eight counts of mail fraud (18 U.S.C. 1341) and one count of conspiring to defraud the United States (18 U.S.C. 371). Before trial, petitioner moved to dismiss the indictment, arguing that the Double Jeopardy Clause barred the government from bringing the indictment. The district court denied the motion because the

charges in the indictment (substantive mail fraud and conspiracy to defraud the government) are not the same as the charge in the prior information (mail fraud conspiracy). Pet. App. B3-B4. Petitioner again appealed.

The court of appeals consolidated, and then dismissed, petitioner's appeals from the orders setting aside his guilty plea and denying his motion to dismiss the subsequent indictment on double jeopardy grounds. The court first held that the district court's order vacating petitioner's guilty plea and dismissing the information to which petitioner had pleaded guilty was not a final order, because it did not result in petitioner's conviction and because it left no pending charge against petitioner (Pet. App. A3-A6, citing *Parr* v. *United States*, 351 U.S. 513 (1956)).

The court of appeals also rejected petitioner's separate claim that the indictment should have been dismissed on double jeopardy grounds. The court agreed with the district court that petitioner's claim was not subject to interlocutory appeal because petitioner did not present a colorable double jeopardy claim. The court reasoned that the charge contained in the information to which petitioner had pleaded guilty and the charges in the indictment were not the same for double jeopardy purposes (Pet. App. A8-A10). According to the court of appeals, the substantive mail fraud charges in the indictment were clearly distinct from the mail fraud conspiracy charge in the previous information, based on the well-settled principle that a conspiracy and the underlying substantive crime are separate offenses. And the court found that the conspiracy to defraud the United States charged in the indictment was a separate offense from the mail fraud conspiracy charged in the in-

formation, because each offense required proof of a fact not required by the other (Pet. App. A8-A9, citing *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)).

The court then went on to describe what it saw as "an equally compelling reason to dismiss this appeal as premature, even were we to assume that defendant has a colorable claim" (Pet. App. A10). It held (*id.* at A16-A17) that, "to the extent double jeopardy claims are based on allegedly wrongfully voided plea agreements, appellate review of the order voiding the agreement must await trial of the subsequent charges allegedly covered in the voided plea agreement."

ARGUMENT

At the outset, petitioner seems to contend (Pet. 7-8) that under this Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977), the court of appeals was wrong in dismissing his interlocutory appeal on the ground that it did not present a "colorable" double jeopardy claim. This contention is without merit. A defendant in a criminal case may not convert an otherwise unappealable interlocutory order into an appealable order merely by claiming that the order violates the Double Jeopardy Clause. As this Court observed in *Richardson* v. *United States*, 468 U.S. 317, 322 (1984), a double jeopardy claim must at least be "colorable" before it will support a pretrial appeal under *Abney*.

In this case, the court of appeals correctly found that petitioner's motion to dismiss the indictment did not present a sufficiently colorable double jeopardy claim to support an interlocutory appeal. Nowhere in his petition does petitioner refute (or even acknowledge) the correct holdings of the district court

(Pet. App. B3-B4) and the court of appeals (*id.* at A8-A10) that the charge to which he had previously pleaded guilty—conspiracy to commit mail fraud—was not the "same offense" as any charge included in the present indictment, which alleges only substantive mail fraud and conspiracy to defraud the United States. Because petitioner has never been placed in jeopardy on the charges contained in the present indictment, he has no colorable double jeopardy claim.[1]

In any event, even when a defendant is, because of a finding that he breached a plea agreement, faced with trial on the *same* charge to which he has already pleaded guilty, the voided plea agreement cannot form the basis for a colorable double jeopardy claim. When a defendant contends that the prosecution has not abided by a plea agreement, it is the terms of the agreement, not the Double Jeopardy Clause, that define his rights. If a defendant pleads guilty to an offense, has that plea vacated because of what the government contends (and the trial court finds) is a breach of the plea agreement, and then is faced with trial for the same offense, the legality of proceeding with the trial depends entirely on whether there was a breach of the plea agreement and whether the agreement permits the reinstatement of charges in the event of a breach. The lawfulness of the trial in that setting does not turn on the protection that

---

[1] Because jeopardy attached, if at all, only to the charge of conspiracy to commit mail fraud, and not to any of the charges in the present indictment, it is unnecessary for this Court to address the question raised in the petition (Pet. 12-14) as to when jeopardy attaches in the context of a guilty plea. In any event, the court of appeals assumed for purposes of its decision that this issue would be resolved in petitioner's favor, *i.e.*, that jeopardy *had* attached in the circumstances of this case (Pet. App. A13 n.6).

the Double Jeopardy Clause would provide in the absence of any agreement. See *Ricketts* v. *Adamson*, No. 86-6 (June 22, 1987), slip op. 6-10. For that reason as well, petitioner did not raise a colorable double jeopardy claim based on the district court's ruling that he had breached the terms of the plea agreement.

As an alternative to its holding that petitioner has no double jeopardy claim, the court of appeals ruled (Pet. App. A16-A17) that, "to the extent double jeopardy claims are based on allegedly wrongfully voided plea agreements, appellate review of the order voiding the agreement must await trial of the subsequent charges allegedly covered in the voided plea agreement." Whatever the merits of that alternative holding, it presents no reason for this Court to grant certiorari, since the judgment of the court of appeals is plainly correct for the independent reasons already discussed. "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

Petitioner claims (Pet. 9-10) that the alternative holding of the court of appeals conflicts with the Second Circuit's decisions in *United States* v. *Abbamonte*, 759 F.2d 1065 (1985), and *United States* v. *Alessi*, 536 F.2d (1976). As the court of appeals correctly noted (Pet. App. A12 n.5), those cases permit a defendant to appeal when he claims "that a former plea agreement prohibits bringing the charges alleged in the indictment." [2] The issue in *Abbamonte*

---

[2] No court other than the Second Circuit has found that such claims will support an interlocutory appeal. See *John Doe Corp.* v. *United States*, 714 F.2d 604, 606 (6th Cir. 1983); *United States* v. *Bird*, 709 F.2d 388, 392 (5th Cir. 1983);

and *Alessi*, however, was whether a prior, valid plea agreement was sufficiently broad in scope to prohibit the government from bringing the charges in the indictment. Neither *Abbamonte* nor *Alessi* nor any other federal case permits a defendant to take a pretrial appeal from a ruling that, because the defendant has breached his prior plea agreement, that agreement has ceased to bind the government not to bring charges. There is therefore no conflict between the decision in this case and the Second Circuit's decisions in *Abbamonte* and *Alessi*.[3]

United States v. *Rosario*, 677 F.2d 614, 615 n.4 (7th Cir.), cert. denied, 459 U.S. 867 (1982); *United States* v. *Eggert*, 624 F.2d 973, 974-975 (10th Cir. 1980).

[3] Petitioner briefly contends (Pet. 11-12) that the district court's order setting aside his guilty plea was not authorized by Fed. R. Crim. P. 32(d), which provides for withdrawal of guilty pleas at the request of the defendant. The government's motion, however, was authorized by Rule 48(a), Fed. R. Crim. P., not Rule 32(d). Under Rule 48(a), the government is entitled to move to dismiss an information, which is what occurred in this case; the court rejected the defendant's claim that the plea agreement barred the court from granting that relief, because the court found that the defendant's breach of the agreement left the government free to dismiss the information and bring any charges the government believed were appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

LOUIS M. FISCHER
Attorney

AUGUST 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40491